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SUPREME COURT

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Supreme Court of the United States

October Term, 1966.

No. 1332.

NATIONAL MOLASSES COMPANY,
Petitioner,

v.

DAVID B. BEEBE, Administrator of the Estate of RICHARD C. KLINE, Deceased,
Respondent,

and

HIGHLAND TANK AND MANUFACTURING COMPANY

and

P. W. MOYER, individually and as the surviving partner of F. M. & P. W. MOYER

and

EASTERN STATES FARMERS EXCHANGE.

BRIEF FOR RESPONDENT, DAVID B. BEEBE, ADMINISTRATOR OF THE ESTATE OF RICHARD C. KLINE, DECEASED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, AND APPENDIX.

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania, dated June 17, 1966, was not reported. It is printed at pages 1A-15A of the pending petition. The opinion of the Court of Appeals for the Third Circuit is reported at 373 F. 2d 886 and is printed at pages 16A-21A of the pending petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 24, 1967. An order of the United States Court of Appeals for the Third Circuit denying National Molasses Company's petition for rehearing was entered on March 27, 1967. National's petition for a writ of certiorari was filed on April 28, 1967. Petitioner seeks to invoke the jurisdiction of this Court under 62 Stat. 928, c. 646, 28 U. S. C. § 1254(1)

QUESTIONS PRESENTED.

1. Should this Court grant certiorari to determine whether federal diversity jurisdiction existed in a case where all the facts necessary to establish such diversity jurisdiction were proved at the trial?

2. Should this Court grant certiorari to review a decision in which a jury found a defendant liable in a negligence case controlled by the Pennsylvania law?

3. Where the Court of Appeals has affirmed the District Court's judgment, should this Court grant certiorari to review a decision denying a motion for judgment n.o.v. on the grounds that the case had been properly submitted to the jury and that no motion under Federal Rule 50(b) had been filed at the close of all the evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioner's "Point One" involves 28 U. S. C. § 1332(a) providing that:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000. exclusive of interest and costs and is between—(1) citizens of different states;"

Petitioner's "Point Two" involves no federal question. It involves two Pennsylvania statutes providing for recovery of damages for death caused by negligence:

(1) The Pennsylvania Wrongful Death Statute, Act of April 15, 1851, P. L. 669, § 19, as amended, 12 Purd. Stat. Ann. §§ 1601-1604.

(2) The Pennsylvania Survival Statute, Act of April 18, 1949, P. L. 512, art. VI, § 601, 20 Purd. Stat. Ann. § 320.601.

Petitioner's "Point Three" involves no constitutional or statutory provision.

STATEMENT OF THE CASE.

This was a diversity action brought under the Pennsylvania Wrongful Death Statute and the Pennsylvania Survival Statute. Suit was instituted by the respondent, administrator of the estate of Richard C. Kline, Deceased, to recover damages for the decedent's survivors. Richard Kline was twenty-one years of age at the time of his death. He was survived by his wife, Doris Mae Kline, and his seven-month old son, Donald. Richard Kline's daughter, Kim, was born eight months after his death.

The accident involved in the suit occurred on August 16, 1960, at the premises of Kline's employer, Eastern State Farmers Exchange (hereafter called "Eastern"), in York, Pennsylvania.

Employees of Eastern were making preparations to clean an underground blackstrap molasses storage tank. During the preparations a bolt fell in the tank. One of Eastern's employees, Wayne Holtzapple, went into the tank to retrieve the loose bolt (176a, 171a-174a). Holtzapple collapsed shortly after entering the tank. Two other Eastern employees unsuccessfully tried to pull Holtzapple out of the tank by hand (174a-178a). Richard Kline, also an Eastern employee, found a rope and took it down into the tank in an effort to save Holtzapple. Kline collapsed in a matter of seconds (179a, 192a). A fifth employee went into the tank with an ammonia mask, but it was inadequate to protect him. He had to be asisted from the tank without saving either Holtzapple or Kline (179a-180a, 12b-14b).

Several minutes later, the York Fire Department arrived. A fireman entered the tank wearing an oxygen mask and removed the two limp forms of Holtzapple and Kline (159a-161a, 11b-12b). Holtzapple survived. Richard Kline died of carbon dioxide poisoning (251a-255a, 308a-310a, 609a-611a). Molasses produces carbon dioxide which accumulates in lethal quantities when stored in tanks

(255a-259a, 269a-273a, 275a-279a, 37b-40b, 43b-56b, 353a-355a, 360a, 365a-367a, 560a-562a, 572a-577a, 581a-584a).[1]

Suit was instituted by respondent against the petitioner, National Molasses Company (sometimes hereafter called "National"). It has been in the molasses business since 1918 (378a) and imports, stores and annually sells millions of gallons of blackstrap molasses from its many terminals throughout the United States (209a, 378a, 639a-642a, 647a, 57b-58b). The hazard involved in storing molasses in tanks is known to the molasses industry and National had special rules relating to the maintenance of its own storage tanks (63b-64b, 587a-592a, 601a-602a, 608a, 526a, 310a-313a, 352a-353a, 526a, 530a-542a, 565a-569a, 503a-507a).

For at least four or five years prior to the accident, respondent had been the exclusive supplier of molasses to Eastern's store at York, Pennsylvania. Respondent's drivers delivered tank loads of molasses to York every six to eight weeks and could see that Eastern and its employees were unaware of the danger. Knowledge of the hazard is not common knowledge among lay persons and, in fact, none of the employees at Eastern's York Service Center knew about the hazards of stored molasses (94a-95a, 103a-110a, 182a-183a, 102a-103a, 155a, 6b-8b, 30b, 194a-197a, 204a-208a, 408a, 284a-285a).

Nevertheless, National never gave any warning or notice to Eastern (or to its employees or to anyone else) that stored molasses produces carbon dioxide in lethal quantities (94a-95a, 104a, 182a, 211a).

Respondent also sued Highland Tank and Manufacturing Company (hereafter called "Highland"). It had

1. The experts explained why Kline died and Holtzapple survived. When Kline entered the tank he had just run a long distance to obtain a rope and he was also in a state of emotional crisis. Both the physical exertion and mental stimulation created an increased rate of respiration which caused Kline to exhale oxygen and inhale carbon dioxide gas at a much more rapid rate than Holtzapple (573a-575a, 259a).

manufactured the tank in which Richard Kline met his death. It was a metal tank, approximately twenty-four feet long and five-and-a-half feet in diameter. It was buried horizontally beneath the concrete floor of Eastern's warehouse.

Respondent also sued F. M. Moyer and P. W. Moyer, the partners who in 1955 had constructed Eastern's warehouse in which the tank was located (N. T. 255-258).[2] Prior to trial, F. M. Moyer died. The suit proceeded against the surviving partner, Paul W. Moyer.

In one form or another, each of the original defendants cross-claimed against the others and filed separate claims against Eastern as third-party defendant. Eastern, Kline's employer, is a farmers' cooperative which sells various farm supplies, feed, seeds and materials of that type, including molasses which it mixes with feed or sells in small drums to farmers (2b, 505a).

Trial was held in the United States District Court for the Eastern District of Pennsylvania before District Judge Alfred L. Luongo and a jury. The jury returned a verdict in favor of respondent and against petitioner. It assessed damages in the Wrongful Death Action of $306,975.00 and in the Survival Action of $72,200.00. The jury also found in favor of petitioner and against Eastern in the third-party action. Judgments were entered on these verdicts. Judgments were also entered upon verdicts which had been directed by the Court in favor of the other two defendants, Highland and Moyer. Cross-claims among the three original defendants were withdrawn, during the trial, by agreement of their counsel.

Petitioner filed motions for judgment n.o.v. or a new trial. The District Judge denied petitioner's two motions

2. Citations to original notes of testimony are used where petitioner did not print the portions to which reference is being made and the omission did not appear sufficiently significant to justify including the evidence in respondent's "Appellee's Appendix" in the Court of Appeals.

but ordered a new trial for petitioner on the issue of damages unless respondent filed a remittitur of the total verdicts in excess of $300,750.00. Respondent filed the remittitur.

Petitioner then appealed to the United States Court of Appeals for the Third Circuit. The judgment was affirmed in a unanimous opinion written by Circuit Judge William H. Hastie. Petitioner's subsequent petition for rehearing was denied.

Petitioner has now filed with this Court a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

ARGUMENT.

I. There Is No Jurisdictional Question to Review Since Respondent Proved There Was Diversity of Citizenship and Jurisdiction.

("First Point", Pet. 13-15.)

At the Pre-Trial Conference held before District Judge John W. Lord, Jr. on October 27, 1964, various facts were stipulated by counsel for all the parties. It was, among other things, stipulated that David B. Beebe, Administrator of the Estate of Richard C. Kline, Deceased, was, at the time of the institution of this suit, a resident and citizen of the State of New Jersey, and that the letters of administration granted to David B. Beebe, to administer the Estate of Richard C. Kline, by the Register of Wills of York County, Pennsylvania, could be received in evidence.

Through Requests for Admission under Federal Rule 36 it was factually established that each of the two corporate defendants, petitioner and Highland, were Pennsylvania corporations doing business in Pennsylvania, with their principal offices in Pennsylvania and not in New Jersey. It was similarly established that defendant Moyer was a citizen of the Commonwealth of Pennsylvania.

At the trial over a year after the Pre-Trial Conference, the factual admissions from the requests for admission and the stipulations of fact from the Pre-Trial Conference were all received in evidence without objection (14b-18b). This constituted sufficient and conclusive proof by plaintiff of the facts necessary to establish diversity of citizenship and jurisdiction in this case. See *Sun Printing & Publishing Ass'n v. Edwards,* 194 U. S. 377, 382 (1904). As was stated in *Giannone v. United States Steel Corp.,* 238 F. 2d 544, 547 (3rd Cir. 1956):

> ". . . 'judicial admissions' . . . are admissions in pleadings, stipulations, etc. . . . which do not have

to be proven in the same litigation. Wigmore, Evidence §§ 1058, 2588 et seq.; McCormick, Evidence, §§ 239, 242 (1954)."

Petitioner never raised any question about the proof of the jurisdictional facts until its petition for rehearing in the Court of Appeals. Perhaps because it had never raised the question earlier, it did not print for the Court of Appeals the portion of the transcript which contained proof of the jurisdictional facts. Those facts were, however, printed in respondent's "Appellee's Appendix" in the Court of Appeals. For the convenience of this Court, they are reprinted as Respondent's Appendix to this Brief.[3]

II. There Is No Need to Review the Decisions of the Courts Below Which Correctly Applied the Pennsylvania Law to the Facts of This Negligence Case.

("Second Point", Pet. 15-29.)

For fifteen of its twenty-one pages of argument petitioner contends that the judgment of the courts below misapplied the Pennsylvania law. Even if petitioner's contention were correct it would not present substantial ground for review under this Court's Rule 19. Moreover, petitioner's contention is not correct. The issues in this case were properly submitted to the jury under Pennsylvania law.

The law applicable to this case is the rule set forth in *Restatement, Torts 2d,* § 388 and many decisions applying Pennsylvania law.[4] That rule is as follows:

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3. Petitioner has not suggested that the controversy does not involve $10,000 exclusive of interest and costs.

4. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F. 2d 292, 299 (3rd Cir. 1961); *Brandon v. Yale & Towne Mfg. Co.*, 220 F. Supp. 855 (E. D. Pa. 1963), *aff'd per cur.* 342 F. 2d 519 (3rd Cir. 1965); *Roberts v. United States*, 316 F. 2d 489 (3rd Cir. 1963); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A. 2d 517 (1949);

The supplier of a product which has properties which are hazardous to human life or health is subject to liability to those persons the supplier could and should anticipate would be endangered by these properties where the supplier

(a) knows or should know of these hazards;

(b) has no reason to believe that those who could be expected to be endangered by these properties would have knowledge of them; and

(c) fails to exercise reasonable care to make known to them the facts and reasons which make the product likely to be dangerous and the precautions to be taken.

In the present case, respondent established the facts which brought his case under the above principle of law and the jury accepted those facts to be true.

III. This Case Presents No Issue Where the Authorities Are in Conflict and Raises No Question of National Importance for This Court to Review.

("Third Point", Pet. 30-33.)

Petitioner argues that there is a conflict in the decisional law on the question of how to measure the loss of future income in a negligence case involving a death. The measure of damages is controlled by the state law which creates the right. Pennsylvania law applies in this case. The Pennsylvania law is perfectly clear. A jury should not consider the effect of income taxes on the decedent's earning capacity. *Girard Trust Corn Exchange Bank v. Philadelphia Transportation Company,* 410 Pa. 530, 538, 190 A. 2d 293, 298 (1963).

Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A. 2d 850 (1945); *Alfieri v. Cabot Corp.,* 235 N. Y. Supp. 2d 753, 17 A. D. 2d 455 (1962), *aff'd* 13 N. Y. 2d 1027, 195 N. E. 2d 310 (1963) (applying Pennsylvania law); *Thomas v. Arvon Products Co.,* 424 Pa. 365, 227 A. 2d 897 (1967).

Petitioner further complains that the courts below held that it had no standing to ask that the jury's verdict be set aside. Admittedly, petitioner failed, at the trial, to file a motion for a directed verdict at the close of all the evidence, as is required by Federal Rule 50(b).[5] The rule is well settled that the filing of a motion for directed verdict at the close of all the evidence is a prerequisite of a motion for judgment n.o.v. under Federal Rule 50(b). *Hernandez v. Employers Mutual Liability Ins. Co.*, 346 F. 2d 154, 155 (5th Cir. 1965); *Gebhardt v. Wilson Freight Forwarding Co.*, 348 F. 2d 129, 132 (3rd Cir. 1965).

As this Court recently said in *Neely v. Martin K. Eby Construction Co., Inc.*, 35 U. S. Law Week 4253, 4255 (opinion dated March 20, 1967):

> "The opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)."

Notwithstanding the petitioner's failure to comply with Rule 50(b), the District Judge, experienced in the application of Pennsylvania law to death claims arising in negligence actions, reviewed all the arguments made by petitioner in support of its motion. He concluded that they were substantively without merit. Petitioner repeated all

5. "(*b*) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict . . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ."

its arguments to the Court of Appeals which nevertheless affirmed the judgment of the District Court.

This situation presents no "decisional conflict" or question which will "affect litigants on a national scale" (Pet. 30) for this Court to review.

CONCLUSION.

Petitioner's efforts to make it appear that this case involves a constitutional issue, a problem of federal jurisdiction or a conflict of decisions involving important questions of federal law or procedure are superficial and devoid of substance. The heart of the petition is the complaint that the case was incorrectly decided under Pennsylvania law. The petition would not be encompassed by this Court's Rule 19 even if petitioner's contention were correct. Moreover petitioner's contention is not correct.

Respondent, David B. Beebe, Administrator of the Estate of Richard C. Kline, Deceased, submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1967

APPENDIX.

(N. T. 244, App. 14b)

Mr. Gerber: If the Court please, I would like

(N. T. 245, App. 15b)

to read in some admissions from the pleadings and the pretrial conference.

The Court: Members of the jury, what counsel is about to do is read in certain things which have been admitted, and you are to consider as if those matters that he reads to you have been established by the testimony in the case.

Mr. German: Will you tell us what you are going to read so we can locate it before you start to read it.

Mr. Gerber: Yes; I am going to be reading from one to the other.

There were requests for admissions under Rule 36 submitted to each of the defendants and there were no denials of these facts.

On the date of the institution of this suit, defendant, Highland Tank and Manufacturing Company, was a corporation incorporated under the laws of the Commonwealth of Pennsylvania and had its principal place of business at Stoystown, Somerset County, Pennsylvania, and not in New Jersey.

No. 2: On the date of the institution of this suit, defendant, National Molasses Company, was a corporation incorporated under the laws of the Commonwealth of Pennsylvania and had its principal place of business at Oreland, Montgomery County, Pennsylvania, and not in New Jersey.

(N. T. 246)

3. On the date of the institution of this suit, defendant, F. M. Moyer and P. W. Moyer, were adult individuals residing in York, York County, Pennsylvania, and were co-partners, trading and doing business as F. M. and P. W. Moyer, with their principal place

(App. 16b)

of business in York, York County, Pennsylvania, and not in New Jersey.

At the pretrial conference in this case it was stipulated that at the time of the institution of this suit the plaintiff, David B. Beebe, was a resident and citizen of the State of New Jersey.

At the pretrial conference it was also agreed that a copy of the letters of administration granted to David B. Beebe, to administer the estate of Richard C. Kline, late of Red Lion Borough, York County, could be received in evidence.

I have produced the original and copies which I will show to opposing counsel so they can see that the copies conform to the original and request permission to offer the copy in lieu of the original.

The Court: There being no objection, they will be received.

(Document entitled, "Letters of Administration," was marked Exhibit P-12 for identification.)

Mr. Gerber: If Your Honor please, at the pre-

(N. T. 247)

trial conference it was stipulated that the following documents might be offered in evidence without objection:

The birth certificate of Richard C. Kline;
The death certificate of Richard C. Kline;
The marriage license of Richard C. Kline;

The birth certificates of Richard C. Kline's two children;

The high school record of Richard C. Kline; and the college record of Richard C. Kline.

I have produced the originals and copies which I will show to opposing counsel with the request that I might offer the copies in lieu of the originals.

(App. 17b)

Mr. German: If you say they are copies, they are copies.

Mr. Gerber: P-13 will be the birth certificate, Your Honor.

(Birth certificate of Richard Charles Kline was marked Exhibit P-13 for identification.)

Mr. Gerber: P-14 will be the death certificate.

(Proof of death certificate, Richard Kline, was marked Exhibit P-14 for identification.)

Mr. Gerber: P-15 will be the birth certificate of Donald Adams Kline born on August 27, 1959.

(Notification of birth registration, Donald

(N. T. 248)

Adams Kline, was marked Exhibit P-15 for identification.)

Mr. Gerber: P-16 will be the birth certificate of Kim Lea Kline, born April 23rd, 1961.

(Notification of birth registration, Kim Lea Kline, was marked Exhibit P-16 for identification.)

Mr. Gerber: P-17 will be the marriage certificate of Richard C. Kline and Doris Mae Adams.

(Marriage certificate was marked Exhibit P-17 for identification.)

Mr. Gerber: P-18, Your Honor, will be the transcript of the Perry Township High School, Shoemakersville, Pennsylvania, relating to Richard C. Kline.

(Document entitled, "Perry Township High School, Shoemakersville, Pa.," was marked Exhibit P-18 for identification.)

(App. 18b)

Mr. Gerber: P-19 will be the transcript of the record of Richard Charles Kline from The Pennsylvania State University; it is two pages in length and it shows at the conclusion that a B. S. degree was conferred on June 11, 1960.

(Academic record, The Pennsylvania State University, Richard Charles Kline, was marked Exhibits P-19-A, P-19-B for identification.)

The Court: If there is no objection to the receipt of those documents in evidence, they will be received,

(N. T. 249)

Nos. P-13 through P-19-B.

(P-13, P-14, P-15, P-16, P-17, P-18, P-19-A, P-19-B, in evidence:)

* * *